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No. 10-732

In The

Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS AND MELISSA CLOSTERMAN AND SCOTT A. CORNELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit correctly affirmed the District Court's dismissal of Petitioner's complaint, which failed to allege that Petitioner was terminated because she gave information or testified, or was about to testify, in any inquiry or proceeding relating to Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140.

2. Whether a conclusory allegation, with no factual support, that Petitioner "objected and/or complained to" management about possible violations of ERISA is a sufficient pleading stating a plausible claim for relief under Section 510 of ERISA.

OBJECTION TO PETITIONER'S QUESTION PRESENTED

In addition to Petitioner's question presented to the Court, Respondents present the question of whether Petitioner's Complaint is sufficient as a matter of law when it fails to plead any facts that Petitioner "objected and/or complained to" management about possible violations of ERISA. Respondents raised this issue in the District Court and before the Court of Appeals for the Third Circuit.

CORPORATE DISCLOSURE STATEMENT

Respondent A.H. Cornell and Son, Inc. is a family-owned company. It is not owned by any parent corporation or any publicly-held company owning 10% or more of Respondent A.H. Cornell and Son, Inc.'s stock.

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STATEMENT

Petitioner does not state any compelling reasons to support a writ of certiorari in this case. Petitioner alleges that A.H. Cornell administered a group health plan on a discriminatory basis, withheld group plan information from employees, and enrolled non-citizens in the health plan. Resp. App. 7-8. Petitioner alleges that she "objected and/or complained to [Respondents'] management" about Respondents' conduct. *Id.* Petitioner contends that these scarce facts constitute protected activity under Section 510 of ERISA, 29 U.S.C. § 1140.

No Circuit Courts of Appeals have held that unsolicited, internal complaints constitute protected activity under Section 510 of ERISA, 29 U.S.C. § 1140. All of the Courts of Appeals which have analyzed Section 510 of ERISA unanimously agree that a complainant must do more than unilaterally voice concerns to an employer. Section 510 contains a specific requirement that the complainant "has given information or has testified or is about to testify in any inquiry or proceeding" 29 U.S.C. § 1140. These cases are discussed at length, *infra*. Simply put, Section 510 clearly means what it says. Section 510's use of the words "inquiry" and "proceeding" means that the complaining employee must be engaged in an interactive investigation process. The complaining employee must voice concerns in response to a request, whether from the employer or an investigating agency. Section 510 does not protect an employee for

unilaterally stating an opinion about possible ERISA violations outside the confines of a formal process.

Further, there is no conflict between the Courts of Appeals which have considered the issue. Petitioner cites to two cases, *Anderson v. Electronic Data Systems*, 11 F.3d 1311 (5th Cir. 1994) and *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993) and argues that the holdings from these cases support a conclusion that Section 510 protects unsolicited internal complaints about ERISA violations. These cases support no such conclusion. Both cases addressed only whether ERISA preempts analogous state law whistleblower complaints. Neither case examined whether the claimants in those cases had any protection under Section 510 for unsolicited, internal complaints. Given that both cases addressed preemption, it would have been impossible and illogical for either of the Courts of Appeals to make any such pronouncement in those cases.

Finally, Petitioner's complaint pleads absolutely no facts about how she voiced her supposed concerns. Not only is the complaint deficient as a matter of law, but it leaves it impossible for this Court to make any important pronouncement of federal law. The mystery surrounding the facts of Petitioner's important whistleblowing conduct creates a factual void. Granting a writ of certiorari in this case would be unproductive since subsequent litigants and Courts that address Section 510 would not be able to compare their facts to this case. In sum, this is a poor vehicle for certiorari.

Accordingly, this Court should deny the petition for a writ of certiorari.

STATEMENT OF FACTS

Factual Background

Respondent A.H. Cornell & Son, Inc. ("A.H. Cornell"), is a family-owned construction company. Pet. App. 2a. It provides commercial and residential construction services such as paving, snow removal, and recycling. Pet. App. 3a. A.H. Cornell hired Petitioner in March, 2006, to establish a human resources department. *Id.* A.H. Cornell had a group health plan that was governed by ERISA. Petitioner alleges that A.H. Cornell administered the group health plan on a discriminatory basis, withheld group plan information from employees, and enrolled non-citizens in the health plan. *Id.* Petitioner alleges that she "objected and/or complained to [Respondents'] management" about Respondents' conduct. *Id.* Petitioner further claims that she was terminated for the "aforesaid inquiries, objections, opposition and/or complaints about ERISA violations." *Id.* No other specifics about Petitioner's protests are set forth in her complaint. Resp. App. 7-8.

Course of Proceedings Below

On March 18, 2009, Petitioner filed a complaint against Respondents A.H. Cornell, Scott A. Cornell,

and Melissa Closterman. *Id.* Scott Cornell is one of the owners and President of A.H. Cornell; Melissa is his sister, who is also employed by the Company. Resp. App. 3. Petitioner initiated this action under ERISA, 29 U.S.C. § 1001, *et seq.* Pet. App. 4a. On May 18, 2009, Respondents filed a motion to dismiss that complaint because the complaint was insufficient as a matter of law. *Id.*

On July 23, 2009, the District Court granted Respondents' Motion to Dismiss because Petitioner failed to allege any conduct which would bring her within the ambit of Section 510 of ERISA. *Id.* The District Court declined to exercise supplemental jurisdiction over Petitioner's state law claim and consequently dismissed the entire case. *Id.*

Petitioner appealed to the United States Court of Appeals for the Third Circuit. The sole issue facing the Court of Appeals was whether the District Court erred in finding that "unsolicited internal complaints are not protected activities under the anti-retaliation provisions of Section 510 of ERISA. . . ." Pet. App. 5a. The Court of Appeals analyzed (a) the plain language of Section 510 of ERISA; (b) the decisions of the Courts of Appeals for the Second, Fourth, Fifth, and Ninth Circuits which discuss Section 510 of ERISA; (c) the background of ERISA; and (d) analogous Third Circuit precedent analyzing the whistleblower provisions of Section 15(a)(3) of the Fair Labor Standards Act (29 U.S.C. § 215(a)(3)) and Section 507(a) of the Clean Water Act (33 U.S.C. § 1367(a)). Pet. App. 5a-18a. The thorough analysis of the Third Circuit Court

of Appeals led to the conclusion that unsolicited internal complaints are not protected under Section 510 of ERISA. Pet. App. 19a. The Court correctly noted that there is no disagreement between the Circuits on the substance of Section 510. Pet. App. 7a-10a. The Court observed that while some Circuits like the Fifth and the Ninth have dealt with cases involving Section 510, those cases were faced with the issue of whether Section 510 preempted other claims, and they did not involve a substantive analysis of the issue raised in this case. The Court of Appeals noted that the Circuits which have actually analyzed Section 510's language on a substantive basis, including the Fourth and the Second Circuits, reached the conclusion that Section 510's plain language did not protect unsolicited internal complaints. Pet. App. 10a-11a.

Objections to Petitioner's Statement of Facts

This matter comes before the Court on a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Thus, while Respondents dispute the accuracy of the minimal facts put forth by Petitioner, for the purposes of this Appeal, Respondents assume that they are true as pled in the Complaint.

REASONS FOR DENYING THE PETITION

A. A writ of certiorari is not warranted in this case because there is no significant dispute between the Circuit Courts of Appeals which have analyzed the meaning of Section 510 of ERISA.

1. The plain language of ERISA Section 510 supports a simple conclusion and the Circuit Courts of Appeals that have analyzed this language in detail (the Second, Third, and Fourth) are all in agreement about the meaning of that language.

In relevant part, ERISA Section 510, entitled "Interference with Protected Rights" provides that

> [i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter. . . . *It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter.* . . .

29 U.S.C. § 1140 (emphasis added).

The prototypical Section 510 claim arises when a termination is motivated by an employer's desire to prevent a petitioning employee's pension from vesting. *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 143 (1990). This type of claim is often referred to as an interference claim. Additionally, Section 510 provides a remedy for individuals discriminated against because they have given information or testified in an inquiry or proceeding related to ERISA. *E.g.*, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005).

In her complaint, Petitioner does not allege that she was terminated for attempting to exercise her own rights under any ERISA-governed plan. *See generally*, Resp. App. 3-8. Nor does she claim that she was denied any benefits for which she was eligible. *Id.* The only part of Section 510 that could conceivably apply to Petitioner is the sentence barring the discharge of an employee for giving information or testifying in an inquiry or proceeding.

By its terms, Section 510 requires that an individual must have "given information" or "testified" (or is about to testify) in "any inquiry or proceeding relating to this chapter." 29 U.S.C. § 1140. Absent a clearly expressed legislative intention to the contrary, ERISA's statutory language must ordinarily be regarded as conclusive. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *see also Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir.

1998) ("[w]here the statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result.").

The Court of Appeals for the Third Circuit recognized the plain and unambiguous meaning of Section 510. The Court considered the term, "inquiry" to mean exactly what the term is commonly understood to mean. As that Court observed, "inquiry" is most easily defined as "[a] request for information," based on the definition of that word in *Black's Law Dictionary, 9th Edition*. Pet. App. 12a. The Court rejected Petitioner's argument that the interrogative word "inquiry" could be twisted in some way to mean the same as the declarative word, "statement." Pet. App. 12a. The Court of Appeals recognized that the word "inquiry" naturally encompassed only situations where one party makes a request for information from another party. Pet. App. 12a-13a.

The Court of Appeals for the Third Circuit also performed the same analysis with the meaning of the word "proceeding." Again, the Court recognized that "proceeding" is generally used in the English language to describe a formal process – initiated either through a lawsuit or an agency. Pet. App. 13a. To confirm the meaning of this common and basic word, the Court again turned to the same dictionary that lawyers and judges have used for years. Pet. App. 13a. The Court did not have to make any great leaps of logic, nor did it employ any kind of legal mysticism. The meaning of the words "proceeding" and "inquiry"

can be found in everyday use, and are not arcane relics from a dead language.

While recognizing that Petitioner and the Secretary of Labor wanted these words to have broader meaning in order to aid in the "liberal construction" of ERISA, the Third Circuit Court of Appeals recognized its Constitutional duty to stay within the parameters of Congress' choice of words. Pet. App. 14a. The Court did not ignore the recognized intent of ERISA to protect plan participants and, in fact, acknowledged ERISA's intent. Pet. App. 14a. However, the Court also recognized that Congress' choice of words left absolutely no uncertainty about Congress' intent. Pet. App. 14a. Had Congress intended Section 510 to encompass unsolicited, internal "statements" to management, Congress would have used appropriate words to manifest this desire. Pet. App. 14a-15. Because Congress left no ambiguity in its choice of words, the Court took Congress at its word (or choice of words in this case). Pet. App. 14a-15a.

By giving these words their usual and customary meaning, the Court of Appeals for the Third Circuit agreed with the holdings of the Courts of Appeals for the Fourth and Second Circuits. These two appellate courts are the only other Circuit Courts of Appeals to have analyzed the meaning of Section 510's anti-retaliation provision. In *King v. Marriott Intern. Inc.*, 337 F.3d 421, 428 (4th Cir. 2003), the Court of Appeals for the Fourth Circuit held that purely intra-company complaints did not bring a plaintiff within the ambit of Section 510 because such complaints did

not involve an official proceeding. *Id.* at 427-28. In *King*, the employee had worked in Marriott's benefits department for many years when she learned of Marriott's intent to transfer millions of dollars from its medical plan into its general corporate reserve. *Id.* at 423. King believed the transfer violated ERISA and expressed her concerns to co-workers, her supervisor (verbally and in writing) and to in-house attorneys. *Id.* She even went so far as to request an opinion letter from one of the in-house attorneys. *Id.*

Analyzing the facts of *King* in the context of Section 510, the Court of Appeals for the Fourth Circuit explained that the use of the word "testify" suggests that "inquiry or proceeding" requires something more than complaints to a supervisor. *Id.* at 427. The phrase "given information" is merely to protect a person's providing of non-testimonial information, but still in the context of an inquiry or proceeding. *Id.* at 427.

Like the Court of Appeals for the Third Circuit, the Fourth Circuit Court of Appeals reached this conclusion by looking at the plain meaning of the words contained in Section 510. Further, the Court of Appeals for the Fourth Circuit compared Section 510's language to other anti-retaliation provisions to highlight the dramatic difference between Congress' use of the words "inquiry" and "proceeding" in Section 510 as opposed to the anti-retaliation provisions in other statutes. As correctly recognized by the Fourth Circuit, the anti-retaliation provision in Section 510 is much narrower than the equivalent anti-retaliation

provision in Title VII. *Id.* at 427. Title VII broadly protects employees that have "opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The Courts of Appeals for the Third and Fourth Circuits considered it significant that Congress would choose a much narrower wording for Section 510's anti-retaliation provision. Both Circuits easily reasoned that Congress did not wish to protect employees that simply stated their opinions about possible ERISA violations without being prompted by some form of formal inquiry or proceeding.

The Court of Appeals for the Second Circuit performed a similar analysis of the word, "inquiry." *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 330 (2d Cir. 2005). In that case, Chrystina Nicolaou worked as director of human resources and served as the fiduciary of Horizon's 401K plan. When Nicolaou discovered that the plan was underfunded, she immediately raised her concerns to the CFO, and on two later occasions with the Controller, neither of whom took any action in response. *Id.* at 326. Nicolaou then contacted the company's attorney. Subsequently, the company's attorney and Nicolaou bought the issue to the Company's president. *Id.*

The Court of Appeals for the Second Circuit analyzed whether these facts would qualify as an "inquiry" within the meaning of Section 510. *Id.* at 330. That Court, like the Courts of Appeals for the Third and Fourth Circuits, observed that the term,

"inquiry" as used in Section 510 of ERISA, contemplated some predicate request by another party. *Id.* at 329. The Second Circuit observed that the customary usage of the word "inquiry" is "the act or an instance of seeking truth, information, or knowledge about something" or "a request for information." *Id. quoting*, *Webster's Third New International Dictionary* 1167 (1993). This led the Court to conclude that, "[c]ertainly if Nicolaou can demonstrate that she was contacted to meet with [the President] in order to give information about the alleged underfunding of the Plan, her actions would fall within the protection of Section 510." *Id.* at 330. The Court noted that in Nicolaou's case, the meeting was initiated at the attorney's behest, therefore satisfying the plain language of Section 510's use of the term, "inquiry." *Id.*

Similar to the Courts of Appeals for the Third and Fourth Circuits, the Second Circuit also did not consider Congress' use of the terms, "inquiry" and "proceeding" to be superfluous. *Id. citing*, *TRW v. Andrews*, 534 U.S. 19, 31 (2001). The Court of Appeals for the Second Circuit considered it important that Congress inserted the term, "inquiry" into Section 510, but that term did not appear in the anti-retaliation provisions of the Fair Labor Standards Act. *Id.* at 329. Rather than overlook this important term as Petitioner would, the Second Circuit considered Congress' use of the term, "inquiry" in conjunction with the word, "proceeding" a strong indication to "'give the nouns the separate, normal meanings. . . .'"

Id. citing, *Garcia v. United States*, 469 U.S. 70, 73 (1984).

Based on the foregoing, there is no doubt that the Circuit Courts of Appeals which have analyzed the language of Section 510 have concluded that the customary definitions of the terms, "inquiry" and "proceeding" require something more than unsolicited, internal grievances in order to be protected under ERISA. The Courts of Appeals for the Fourth, Second, and now the Third Circuit simply looked at Congress' choice of words and applied those words. These Circuit Courts did not engage in unnecessary analysis or speculation over the meaning of the words because they are everyday words. Moreover, the Court of Appeals for the Third Circuit specifically gave consideration to ERISA's intent to protect employee benefit plans and whistleblowers, but noted that Congress' choice of words left virtually no room for doubt as to what Congress intended.

Here, the Petitioner desperately strives to urge interpretations that go beyond the meaning of the words Congress used in order to make the statute seem more reasonable and protective. As a result, she substitutes her judgment and reasoning for that of Congress. Even assuming *arguendo* that Petitioner has a noble and righteous view of how Section 510 ***should*** work, ERISA is a highly complex statute that is part of an intricate body of law. ERISA "imposes participation, funding, and vesting requirements" on pension plans, and sets uniform standards for "reporting, disclosure, and fiduciary responsibility" for

pension plans and employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Fiduciaries have an obligation under ERISA to monitor plan compliance, investigate possible violations, and take remedial action. 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a). Even experienced labor attorneys and accountants struggle to understand these requirements. As a result, it makes perfect sense that Congress did not want to make individual employees, acting by themselves, the enforcement arm of such a complex statutory scheme. Giving special attention to every employee's personal interpretation of ERISA without help from others would lead to a plethora of suits for "enforcement of ERISA rights." Without some sort of formal investigation or proceeding by a plan fiduciary, a controller, or the Labor Department to determine the merits of the complainant's statement, this would make virtually every employee a purported expert on plan requirements at the complaint's outset. Given the complexities of ERISA it therefore makes perfect sense that Congress sought to limit ERISA's whistleblower protection to more formal instances where the employee has "testified or is about to testify in any inquiry or proceeding." 29 U.S.C. § 1140.

Petitioner also relies heavily on the argument that Section 510 must protect unsolicited internal complaints because a narrow interpretation would permit and encourage retaliatory terminations and discourage employees from reporting ERISA violations. Pet. Br. pp. 23-25. This argument works both ways because inquires and investigations are two-way

streets. Section 510's use of the words "inquiry" and "proceeding" shows that Congress envisioned situations whereby more than one party is at the table. In other words, Congress was not just thinking about complaining employees, but also the employer or plan fiduciaries. As stated, *supra*, fiduciaries have an obligation under ERISA to monitor plan compliance, investigate possible violations, and take remedial action. 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a). While Petitioner speculates that unscrupulous employers might short-circuit the investigation process by silencing complaints, equally unscrupulous employees might also cut off a fiduciary's investigation if every unsolicited gripe was protected. An employee could thwart the investigation process by filing a claim asserting whistleblower protection for simply raising a grievance. The employee would then have an incentive to refuse to participate in the investigation. Congress' use of the words, "inquiry" and "proceeding" manifests a desire for an employer to utilize investigations to determine potential ERISA violations. Had Congress intended to give only one party to that investigation protection, it would have used a phrase similar to what appears in Title VII – protecting only the employee who "opposes" discrimination, not the employer. 42 U.S.C. § 2000e-3(a). Petitioner's idea that Section 510 is designed to protect only employees at the expense of employers and plan fiduciaries is consequently without any merit.

Further, Congress is the only authority on drafting the complex body of anti-retaliation provisions.

This is not Congress' first anti-retaliation provision. Whistleblower provisions are not new legal concepts. Congress has drafted anti-retaliation provisions for over 40 years. Anti-retaliation provisions are often part of a more comprehensive and complex piece of legislation. Some brief examples of the many anti-retaliation provisions which Congress inserted into legislation over the years include:

- The Clean Air Act, 42 U.S.C. § 7622, granting protection to an employee that has:

  > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
  >
  > (2) testified or is about to testify in any such proceeding, or
  >
  > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

- The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610, which protects an employee that:

  > has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any

proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

- The Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 219, which prevents an employer from taking action against an employee because the employee:

  (1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

  (2) testified or is about to testify in a proceeding concerning such violation.

- The Energy Reorganization Act, 42 U.S.C. § 5851, protecting an employee that has:

  (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011, *et seq.*);

  (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the

employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

- The Safe Water Drinking Act, 42 U.S.C. § 300j-9, which protects an employee that has:

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for

> the administration or enforcement of drinking water regulations or underground injection control programs of a State,
>
> (B) testified or is about to testify in any such proceeding, or
>
> (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

- The Toxic Substances Control Act, 15 U.S.C. § 2622, preventing an employer from retaliating against an employee that has:

  > (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
  >
  > (2) testified or is about to testify in any such proceeding; or
  >
  > (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

With each of these aforementioned Acts, we must presume that Congress made careful and deliberate considerations about how these anti-retaliation provisions fit within the broader purpose of each of these Acts. Not all of these Acts give blanket protection to every internal grievance or voluntary complaint to

an employer. Some are broad while others are narrow. As with Section 510 of ERISA, Congress selected certain words in each of these statutes. For the Petitioner to assume that she is a better legislator than Congress ignores the long history and vast experience of Congress in implementing anti-retaliation provisions to further specific legislative goals. Even if Petitioner's desired statutory protection makes sense – even more sense than that chosen by Congress – only Congress, and not the courts or individual plaintiffs, formulate the law. Clearly, when Congress intends to protect unsolicited, internal complaints to further a piece of legislation, Congress knows what language to use. Given the many examples of anti-retaliation provisions in other statutes, Congress has many models to choose from.

As a result, the plain language of ERISA Section 510 can only be read to protect whistleblowers who have given information or have testified or are about to testify in any inquiry or proceeding. 29 U.S.C. § 1140. ERISA Section 510 cannot be read to protect an employee who submits a unilateral, unsolicited complaint or "opposes" an unlawful practice.

2. Petitioner overstates the analysis by the Fifth and the Ninth Circuit Courts of Appeals of Section 510 because those Circuit Courts have only analyzed Section 510 in the context of whether that Section preempts state law retaliation claims.

Petitioner argues that there is a split among the Circuits over the meaning of Section 510. She cites only two cases, and those cases have no real in-depth explication of Section 510, but rather have treated it only in a cursory manner: *Anderson v. Electronic Data Systems*, 11 F.3d 1311, 1314 (5th Cir. 1994) and *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411 (9th Cir. 1993). Petitioner greatly overstates the holdings of these cases. Contrary to what Petitioner contends, the holdings of *Anderson* and *Hashimoto* do not present an analytical divide because neither the *Anderson* Court nor the *Hashimoto* Court addressed the meaning of Section 510's language in question here.

In 1993, the Ninth Circuit Court of Appeals addressed whether Section 510 of ERISA preempted plaintiff Jessica Hashimoto's claims of retaliation in violation of Hawaii's Whistle Blower's Protection Act (Haw. Rev. Stat. §§ 378-61, *et seq.*). *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 409 (9th Cir. 1993). In that case, Hashimoto claimed that she complained to two employees about an improper reimbursement from a profit-sharing plan and an improper benefit calculation. *Id.* Hashimoto alleged that several times

over an 18-month period she complained about these actions, which she considered to be potential or actual ERISA violations. *Id.* Hashimoto contended that she would not have been fired "but for" her complaints. *Id.*

The Court of Appeals for the Ninth Circuit surveyed the state of the law. Contrary to Petitioner's contention, the body of law that the Court addressed was not ERISA, but preemption. *Id.* at 411. The Court simply concluded that because ERISA contained the anti-retaliation provision set forth in Section 510, Hashimoto's claims under Hawaii's Whistle Blower's Protection Act were totally preempted. *Id.* at 411-12. Importantly, the Ninth Circuit did not examine whether Hashimoto's facts set forth a plausible claim for relief under Section 510 – only the extent of whether Section 510 preempted a state whistleblower cause of action. *Id.* The Court specifically avoided the analysis of the words, "inquiry," and "proceeding," to conclude in a perfunctory fashion that Section 510 was "meant to protect whistleblowers." *Id.* All that it did was determine whether a claim of the nature of Hashimoto's was contemplated by Section 510; it specifically did not determine whether her particular facts stated a claim under Section 510. The Ninth Circuit Court of Appeals most likely decided not to focus much attention on the actual language of Section 510, because that issue was not before the Court. The only issue before the Court was whether ERISA's Section 510 preempted an identical state law claim. Alternatively, as the Court of Appeals for the Fourth

Circuit observed, the dicta in the Ninth Circuit's decision about Section 510 could be results driven. *King*, 337 F.3d at 428 fn 4. In fact, when reading the *Hashimoto* decision, the Ninth Circuit's holding that Section 510 was simply, "meant to protect whistleblowers" is a truism that bears little weight.

The fact that Section 510 was designed to protect whistleblowers and preempted a similar state law is a long way from finding that Hashimoto herself was a whistleblower. The fact that a claim is preempted by federal law does not mean that the claim is a valid one; it merely means that federal law regulates the area of rights and remedies. *E.g.*, *Good v. Altria Group, Inc.*, 501 F.3d 29, 46 (1st Cir. 2007) (explaining that Courts do not examine the underlying merits of a plaintiff's claim in a preemption analysis) *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992); *Price v. Phillip Morris, Inc.*, 219 Ill.2d 182, 848 N.E.2d 1, 36-37 (2005); *Mulford v. Altria Group, Inc.*, 506 F.Supp.2d 733, 751-52 (D.N.M. 2007) ("Courts do not determine whether a plaintiff can succeed on the merits of the fraud claim before determining whether the fraud claim itself is preempted."). By way of analogy, if federal speeding laws preempted state speeding laws and the issue in *Hashimoto* involved speeding, Hashimoto's case was preempted because it dealt with speeding. The fact that the case is subject to preemption does not answer the question of whether Hashimoto was in fact speeding. In *Hashimoto*, the question of whether an accusation of retaliation for reporting an ERISA claim

was preempted by federal law does not answer the substantive question of whether Petitioner Edwards' particular conduct was protected by ERISA Section 510. In *Hashimoto*, the Court of Appeals for the Ninth Circuit analyzed Section 510 only far enough to determine whether Hashimoto's claim was the sort of claim that the statute addressed; not whether she stated a substantive claim upon which relief might be granted. *Hashimoto*, 999 F.2d at 411-12. Therefore, when compared against the Courts of Appeals for the Second, Third, and Fourth Circuits' detailed analysis of Section 510's language, the Ninth Circuit's conclusion in *Hashimoto* bears little weight.

In 1994 the Court of Appeals for the Fifth Circuit examined Section 510 to determine whether ERISA preempted a state wrongful discharge claim. *Anderson v. Electronic Data Systems*, 11 F.3d 1311, 1314 (5th Cir. 1994). In that case, plaintiff George Raymond Anderson claimed that he was terminated for refusing to commit ERISA violations and for reporting potential ERISA violations to management. *Id.* at 1313. Anderson filed a claim for wrongful discharge pursuant to Texas state law, not pursuant to Section 510 of ERISA. *Id.* Defendant removed the claim to Federal District Court. *Id.* After the District Court dismissed Anderson's claim, Anderson appealed and asserted that the District Court lacked jurisdiction over his state law wrongful discharge claim. *Id.* The Fifth Circuit analyzed "whether the claims asserted by Anderson are preempted by ERISA." *Id.* After an extensive review of this Court's precedent, the Fifth

Circuit held that Anderson's wrongful discharge claim was preempted by ERISA. *Id.* at 1314.

As with the Ninth Circuit's *Hashimoto* decision, the Court of Appeals for the Fifth Circuit did not analyze the substantive language of Section 510 to determine if Anderson had presented a viable claim. *Id.* The Court did not address the facts of Anderson's claim. It did not hold that Anderson had shown that his complaints were in response to an "inquiry" as part of some "proceeding." In fact, the Fifth Circuit Court of Appeals specifically noted that its holding "does not hinge on whether ERISA provides the remedy the plaintiff seeks or any remedy at all for the alleged wrong." *Id.* In a footnote, the Court cited to *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir.), *cert. denied*, 505 U.S. 1033 (1992) and explained that the lack of an ERISA remedy does not affect a preemption analysis. *Id.* at fn 4. Clearly, the Court's holding in *Anderson* deliberately avoided any analysis of whether unsolicited complaints are covered by Section 510 of ERISA and instead focused only on whether ERISA preempted a state law wrongful discharge claim.

Petitioner erroneously considers both *Hashimoto* and *Anderson* to stand for the proposition that Section 510 of ERISA protects unsolicited internal complaints. Pet. pp. 8-10. As shown, *supra*, there is no basis for this conclusion. The cases provide no substantive analysis of Section 510. Petitioner avoids the actual holdings of both *Hashimoto* and *Anderson* with respect to the preemption issues and cites to these

cases as proof of a "longstanding and growing circuit conflict," that will produce inconsistent results and forum shopping. Pet. pp. 14, 17. Yet neither of these cases are evidence of a Circuit split because only the Courts of Appeals for the Second, Third, and Fourth Circuits have actually addressed the substance of Section 510. *Hashimoto* and *Anderson* provide no basis for Petitioner's conclusion that the Ninth and Fifth Circuits are split from the Second, Third and Fourth Circuits. Indeed, the holdings from *Hashimoto* and *Anderson* only go to preemption, not Section 510's substance.

Accordingly, there is no split between the Circuits. The only Circuits to have addressed the scope of Section 510 are all in agreement. The holdings of the Ninth and the Fifth Circuits in *Hashimoto* and *Anderson* respectively, do not show a pervasive conflict between the Circuits.

B. Even if there is a true split between the Circuits, this is a poor vehicle for analyzing Section 510 given Petitioner's skeletal allegations about unsolicited, internal grievances.

A proper petition for certiorari should address issues of important fact or critical concerns. However, this case would not allow the Court to consider what type of activity constitutes protected activity under ERISA's anti-retaliation provision. Petitioner has barely alleged any facts about her protected conduct

for this Court to consider. Consequently, any decision by this Court on the issue would be limited to such nebulous and theoretical facts that this is not an ideal case for examining the scope of ERISA Section 510's language.

Petitioner vaguely claims in her Complaint that she objected to and/or complained to Respondent's management about violations of ERISA, including but not limited to, the discriminatory basis in which Respondents were awarding ERISA benefits and Respondents' action of permitting non-qualifying ERISA applicants to participate in Respondent's group health plan. Resp. App. 7-8. Petitioner also claims that she objected to and/or complained to Respondents' management and owners about intentionally misleading employees about group health plan information. Resp. App. 8. These are literally the extent of the facts set forth in Petitioner's complaint about Petitioner's protected activity. Resp. App. 7-8.

This kind of pleading is simply a formulaic recitation of legal elements that does not meet the basic fact-pleading standard set forth by this Court. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court held that a pleading which contained only "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Subsequently, this Court extended the reach of *Twombly*, instructing that all civil complaints must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct.

1937, 1949 (2009). Legal conclusions can provide the framework of a complaint, but they must be supported by factual allegations. *Iqbal*, 129 S.Ct. at 1950. In analyzing the sufficiency of any complaint, a District Court must first separate the facts from the legal conclusions and then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* 1949-50. This "plausibility" determination will be a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Using *Iqbal* as a guide, Petitioner's Complaint contains such a paucity of facts that not only is the pleading insufficient as a matter of law; it is entirely deficient for purposes of a writ of certiorari. Petitioner did not allege when she voiced her concerns or to whom. Petitioner has not provided the "who, what, where, and when," surrounding her complaints, let alone give this Court something substantive to consider in regards to certiorari. Did Petitioner leave a note on a desk? Did Petitioner ask for a meeting? Did Petitioner voice her concerns in an email or text message? Did Petitioner leave a voice mail message with Respondent Scott Cornell? Did the Petitioner have a passing conversation about her concerns at an office birthday party? Such omissions are telling, especially in light of the fact that Petitioner did not hesitate to name names when identifying Melissa Closterman and Scott Cornell as individual defendants

for their participation in communicating the fact of her termination. Resp. App. 3.

If this Court were to grant a writ of certiorari, there would be nothing for the Court or future litigants to consider. The Court would be issuing a decision with potentially broad implications, but with absolutely no facts for future guidance. Certainly, if Section 510's language needs clarification from this Court, even a case with a few bare facts about how the Petitioner complained about ERISA violations would be better than the instant case. Accordingly, the Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

SHIRLEY EDWARDS 3100 Knights Way Doylestown, PA 18902 Plaintiff, v. A.H. CORNELL AND SON, INC., d/b/a AH CORNELLS 2362 York Road Jamison, PA 18929 and MELISSA J. CLOSTERMAN 2362 York Road Jamison, PA 18929 and SCOTT A. CORNELL 2362 York Road Jamison, PA 18929 Defendants.	CIVIL ACTION No. 09-1184 **JURY TRIAL DEMANDED**

FIRST AMENDED CIVIL ACTION COMPLAINT

Plaintiff Shirley Edwards (hereinafter referred to as "Plaintiff" unless otherwise indicated) hereby complains as follows against Defendants:

INTRODUCTION

1. Plaintiff has initiated this action to redress violations by Defendants of the Employee Retirement Income Security Act ("ERISA") and various state laws. As a result of Defendants' unlawful actions, Plaintiff suffered the damages set forth herein.

JURISDICTION AND VENUE

2. This Court, in accordance with 28 U.S.C. 1331, has jurisdiction over Plaintiff's claims, which assert violations of ERISA, as set forth herein, because this civil action arises under a law of the United States. This Court has supplemental jurisdiction over Plaintiff's state-law claims because they arise of the same nucleus of operative facts as those set forth in Plaintiff's federal claims.

3. This Court may properly maintain personal jurisdiction over Defendants because Defendants' contacts with this state and this judicial district are sufficient for the exercise of jurisdiction over Defendants to comply with traditional notions of fair play and substantial justice, satisfying the standard set forth by the United States Supreme Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and its progeny.

4. Pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2), venue is properly laid in this district because all of the acts and/or omissions giving rise to the claims set forth herein occurred in this judicial district and

Defendants are deemed to reside where they are subject to personal jurisdiction, rendering Defendants residents of the Eastern District of Pennsylvania.

PARTIES

5. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

6. Plaintiff is an adult individual, with an address as set forth in the caption.

7. Defendant A.H. Cornell and Son, Inc. (hereinafter "Defendant AHC"), upon information and belief, is a Pennsylvania entity that engages in the business of performing contracting and construction services, such as excavation, paving, snow removal, recycling, and other commercial and residential construction projects.

8. Defendant Melissa J. Closterman (hereinafter "Defendant Closterman") manages and/or oversees daily operations within Defendant AHC, and all times relevant herein, directed Plaintiff in her employment and was directly responsible for terminating Plaintiff.

9. Defendant Scott A. Cornell (hereinafter "Defendant Cornell") is an executive of Defendant AHC and was responsible for overseeing the terms and conditions of Plaintiff's employment, and he participated in the termination of Plaintiff's employment.

10. At all times relevant herein, Defendants acted by and through their agents, servants and employees, all of whom acted at all times relevant herein in the course and scope of their employment with and for Defendants.

FACTUAL BACKGROUND

11. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

12. Defendant AHC is a company that consists of approximately 55-65 employees.

13. Plaintiff was hired in or about March of 2006.

14. Before hiring Plaintiff, Defendants did not have any full-time dedicated human resources personnel.

15. Defendants hired Plaintiff to establish a human resources department.

16. Plaintiff had a very significant human resources background and worked for Defendants for approximately 3 years until in or about February 11, 2009.

17. During Plaintiff's tenure with Defendants, she learned that Defendant Closterman was engaging in unlawful acts, and Defendant Closterman requested that Plaintiff participate in acts that were unlawful during Plaintiff's employment with Defendants.

18. In the last several weeks of her employment, Plaintiff learned that Defendants were committing fraud upon their worker's compensation insurance carrier and their disability insurance carrier.

19. For example, Plaintiff learned that an employee actually returned to work with Defendants after sustaining a work-related injury; that while the employee was working, he was still collecting worker's compensation insurance for being out of work; and that this employee had used a false social security number and information to obtain worker's compensation insurance in the first place.

20. Plaintiff was specifically directed by Defendant Closterman to make false statements to Defendants' worker's compensation carrier and to give incorrect and false information about the particular employee who was working while collecting benefits and who was also using a false social security number.

21. Plaintiff was also directed in the last several weeks of her employment by Defendant Closterman to provide false information to a disability insurance carrier for Defendants, including but not limited to, providing the disability insurance carrier with a false name for the disability insurance applicant then residing in Mexico (who, upon information and belief, was not a properly documented non-citizen employee of Defendants).

22. Plaintiff objected to committing criminal fraud upon two (2) separate insurance carriers of Defendant within the 2 weeks before she was terminated from Defendants.

23. Defendants also had a group health insurance plan, governed by ERISA, which Plaintiff learned was being administered illegally within Defendant and on a discriminatory basis.

24. Defendants were obligated to offer employees the benefits of its group health plan equally and on a non-discriminatory basis.

25. Plaintiff learned however that many employees were being lied to about what their actual contributions would be by Defendant Closterman in an effort to dissuade employees from opting into the benefits and that certain employees were not even being offered health benefits at all – all in violation of ERISA-qualifying group health plan requirements.

26. Defendants, through Defendant Closterman, were also withholding and concealing required group plan information from employees of Defendants.

27. Not only was Defendant Closterman unlawfully discriminating against applicants in a group health plan and making intentional misrepresentations to employees and applicants of Defendants, Defendant Closterman was also unlawfully enrolling non-citizens in the ERISA-qualifying life, disability and/or group health plan.

28. To accomplish Defendants' unlawful objectives of enrolling non-citizens falsely in Defendants' ERISA health plan, Defendants terminated their representation of an insurance broker and hired someone whom Defendants' knew personally, who in turn, upon information and belief, enrolled non-citizens through false and unlawful pretenses.

29. Plaintiff objected to participating in a scheme to commit criminal fraud as to Defendants' disability insurance carrier, worker's compensation insurance carrier, and health insurance carrier.

30. The fraud that Plaintiff was directed to commit and/or to participate in as set forth herein all occurred in close proximity to Plaintiff's termination.

31. Plaintiff also learned of many other unlawful activities within Defendant, which were knowing and intentional, all of which will demonstrate that Defendant's actions herein were willful and outrageous.

Count I
Violations of ERISA – Section 510,
29 U.S.C. § 1140
(Retaliation)
– Against All Defendants –

32. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

33. Plaintiff objected to and/or complained to Defendants' management about violations of ERISA,

including but not limited to, the discriminatory basis in which Defendants were awarding ERISA benefits and Defendants' actions of permitting non-qualifying ERISA applicants to participate in Defendants group health plan.

34. At the time of Plaintiff's termination, she was enrolled in Defendants' group life insurance and disability insurance plans, and therefore received benefits and/or might have become eligible to receive benefits under these plans.

35. In addition, at the time of her termination, Plaintiff was eligible to enroll in Defendant's group health insurance plan, and thus may have become eligible to receive benefits under this plan.

36. Defendants' group health insurance plan, life insurance plan, and disability insurance plan are governed by ERISA.

37. Plaintiff is therefore a "participant" under ERISA pursuant to 29 U.S.C. § 1002(7).

38. Plaintiff also objected to and/or complained to Defendants' management and owners about intentionally misleading employees about group health plan information.

39. Upon information and belief, a motivating factor in Plaintiff's termination was her aforesaid inquires objections, opposition, and/or complaints about ERISA violations.

40. Plaintiff's termination for engaging in protected activity therefore constitutes a violation of ERISA, Section 510.

Count II
Common-Law Wrongful Discharge
(Against Defendant AHC Only)

41. The foregoing paragraphs are incorporated herein in their entirety as if set forth in full.

42. Plaintiff was terminated for failing to commit criminal acts, including but not limited to:

i. Insurance Fraud – 18 Pa.C.S. §4117;

ii. Theft by Deception – 18 Pa.C.S.A. § 3922;

iii. Deceptive Business Practices – 18 Pa.C.S.A. § 4107;

iv. Criminal Conspiracy – 18 Pa.C.S.A. § 903;

v. Falsification of Social Security Information – 42 U.S.C.A. § 408; and

vi. Use of and/or Harboring of Unauthorized Employees – 8 U.S.C.A. § 1324

43. The above criminal actions are not intended to be an all-inclusive list of crimes that Defendants were engaged in and/or attempting to commit. Rather, they comprise only some of the crimes that Defendants committed and some of the crimes that Plaintiff objected to and/or refused to participate in while in the employ of Defendants.

44. Defendants' termination of Plaintiff for refusing to commit unlawful actions under state and federal law(s) constitutes a violation of public policy within Pennsylvania.

WHEREFORE, Plaintiff prays that this Court enter an Order providing that:

A. Defendants are to be prohibited from continuing to maintain their illegal policies, practices or customs against employees or prospective employees and are to be ordered to promulgate an effective policy against such retaliation and discrimination and to adhere thereto;

B. Defendants are to compensate Plaintiff, reimburse Plaintiff and make Plaintiff whole for any and all pay and benefits Plaintiff would have received had it not been for Defendants' illegal actions, including but not limited to past lost earnings, future lost earnings, salary, pay increases, bonuses, medical and other benefits, training, promotions, pension, and seniority. Plaintiff should be accorded those benefits illegally withheld (if determined that there are such benefits) from the date she first suffered retaliation at the hands of Defendants until the date of verdict;

C. Plaintiff is to be awarded liquidated damages or punitive damages as permitted by any of her claims herein, in an amount believed by the Court or trier of fact to be appropriate to punish Defendants for their willful, deliberate, malicious and outrageous conduct and to deter Defendants or other employers from engaging in such misconduct in the future;

D. Plaintiff is to be accorded any and all other equitable and legal relief as the Court deems just, proper and appropriate;

E. Plaintiff is to be awarded the costs and expenses of this action and reasonable legal fees as provided by applicable federal and state law;

F. Any verdict in favor of Plaintiff is to be molded by the Court to maximize the financial recovery available to Plaintiff in light of the caps on certain damages set forth in applicable federal law;

G. Plaintiff's claims are to receive a trial by jury to the extent allowed by applicable law. Plaintiff has also endorsed this demand on the caption of this Complaint in accordance with Federal Rule of Civil Procedure 38(b).

Respectfully submitted,

KARPF, KARPF & VIRANT, P.C.

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Dated: June 1, 2009